



Federal Communications Commission
Washington, D.C. 20554
September 4, 2008

In Reply Refer to:
1800B3-TSN

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Re: **AM Broadcast Auction 84
MX Group 84-145**

Easton, California
Facility ID No. 160949
File No. BNP-20040129AMT

Huron, California
Facility ID No. 160556
File No. BNP-20040130BOC

Auberry, California
Facility ID No. 160399
File No. BNP-20040128ANN

Captain Cook, Hawai'i
Facility ID No. 160261
File No. BNP-20040127ABN

**Applications for New AM Station
Construction Permits**

Dear Applicants:

We have before us four mutually exclusive AM applications.¹ John Edward Ostlund ("Ostlund") proposes a new AM station at Easton, California; Huron Broadcasting, LLC ("Huron") proposes a new AM Station at Huron, California; La Favorita Broadcasting, Inc. ("Favorita") proposes a new AM Station at Auberry, California; and Hilo Broadcasting, LLC ("Hilo") proposes a new AM station at Captain Cook, Hawai'i. A fifth applicant, Citicasters Licenses, LP ("Citicasters"), proposed to change the community of license of Station KTLK(AM) from Los Angeles, California, to Downey, California. These applications were designated MX Group 84-145 in AM Auction 84.

In a decision dated January 24, 2008, we found a dispositive preference for Citicasters's application under Section 307(b) of the Communications Act of 1934, as amended (the "Act"),² and also denied Hilo's request to sever its application from MX Group 84-145.³ We directed Citicasters to file its long-form application within 60 days of the date of the Staff Decision. However, Citicasters notified the Bureau that it wished to withdraw its application, and accordingly its application was dismissed by letter dated February 11, 2008.⁴

Because Citicasters's application has been dismissed, we must perform a new Section 307(b) analysis comparing the remaining four proposals in MX Group 84-145. We also consider Hilo's and Ostlund's Petitions for Reconsideration of the Staff Decision.⁵ As discussed below, we find a dispositive Section 307(b) preference for Ostlund's application, dismiss Ostlund's Petition for Reconsideration, deny Hilo's Petition for Reconsideration, and direct Ostlund to file his long-form application for a construction permit at Easton, California, within 60 days of the date of this letter.

Background. On June 15, 2005, the Media Bureau released a *Public Notice* containing a list of 802 MX AM Auction No. 84 window-filed Form 301 tech box applications.⁶ The *AM MX Public Notice* defined three categories of mutually exclusive ("MX") applications, detailed the filings required for each

¹ A mutually exclusive application in this group filed by First Assembly King's Cathedral and Chapels (File No. BNP-20040130BOH) was dismissed on January 29, 2007. See *AM Auction No. 84 Mutually Exclusive Applications Dismissed for Failing to File or Untimely Filing of Required Settlement Agreement, Engineering Solution, or Section 307(b) Showing*, Public Notice, 22 FCC Rcd 1055 (MB 2007). As discussed in the text, the mutually exclusive application of Citicasters Licenses, LP, for a major modification to the facilities of broadcast station KTLK(AM), Los Angeles, California (File No. BMJP-20040130BAE), was dismissed at Citicasters's request on February 11, 2008. See *infra* note 4 and accompanying text.

² 47 U.S.C. § 307(b).

³ *Citicasters Licenses, LP, John Edward Ostlund, Huron Broadcasting, LLC, La Favorita Broadcasting, Inc., and Hilo Broadcasting, LLC*, Letter, Ref. No. 1800B3-LAS/JP (MB Jan. 24, 2008) (the "Staff Decision").

⁴ *Citicasters Licenses, LP*, Letter, Ref. No. 1800B3-LAS/JP (MB Feb. 11, 2008).

⁵ Also before us are Ostlund's Partial Opposition to Hilo's Petition for Reconsideration, filed March 10, 2008, and Favorita's and Hilo's Oppositions to Ostlund's Petition for Reconsideration, filed March 3 and March 10, 2008, respectively.

⁶ See *AM Auction No. 84 Mutually Exclusive Applicants Subject to Auction, Settlement Period Announced for Certain Mutually Exclusive Application Groups; September 16, 2005 Deadline Established for Section 307(b) Submissions*, Public Notice, 22 FCC Rcd 1055 (MB 2007) ("AM MX Public Notice").

category, and specified a September 16, 2005, deadline for submitting the required filings to the Commission. This filing deadline was extended to October 31, 2005, because of Hurricane Katrina.⁷ MX Group 84-145 was listed as a Category I MX group, eligible for settlement. Category I applicants were required to file a settlement agreement, an engineering solution resolving all mutual exclusivities, or a Section 307(b) showing by the filing deadline. Accordingly, on October 26, 2005, Favorita filed a Section 307(b) showing, on October 28, 2005, Hilo filed a Section 307(b) showing, and on October 31, 2005, Citicasters, Huron, and Ostlund filed Section 307(b) showings. Additionally, on May 26, 2006, Hilo filed a pleading titled "Motion to Sever Application from MX Group" ("Motion to Sever").

In situations such as the one before us, the grant of an application would normally be resolved by a competitive bidding process.⁸ However, in the *Broadcast First Report and Order*, the Commission determined that the competitive bidding procedures should be consistent with its statutory mandate under Section 307(b) of the Act to provide a "fair, efficient, and equitable" distribution of radio services across the nation. To this end, the Commission directed the staff to undertake a traditional Section 307(b) analysis prior to conducting an auction for mutually exclusive AM applications.⁹ The Commission also noted that the FM allotment priorities fulfill its obligation under Section 307(b), and would apply in making a Section 307(b) determination regarding mutually exclusive AM applications before auction.¹⁰

In the Staff Decision, we found that of the (then) five mutually exclusive applicants, only Citicasters proposed a true first local transmission service. Although Ostlund ostensibly proposes first local transmission service at Easton, we found that the community of Easton was in fact interdependent with the Fresno, California, Urbanized Area, and thus determined that Ostlund's application should be evaluated under Priority (4), other public interest matters. With Citicasters's application being dismissed, we are now faced with evaluating the remaining four applications, none of which proposes a true first local transmission service.

Discussion. Section 307(b) Analysis. As noted in the Staff Decision, the communities of Captain Cook, Hawai'i, Auberry, California, and Huron, California, all are home to either licensed or permitted full-power radio stations. Because of this and because we have found that the community of Easton is interdependent with the Fresno Urbanized Area, we look to Priority (4), other public interest matters, to determine if any of the remaining proposals merits a dispositive Section 307(b) priority.

All four communities are viable, licensable communities, well served by aural reception service, home to businesses and possessing other community attributes. Under priority (4), the Commission has

⁷ See *Auction No. 84 Settlement Period and Section 307(b) Submission Deadline Extended to October 31, 2005*, Public Notice, 20 FCC Rcd 14492 (MB 2005).

⁸ See *Implementation of Section 309(j) of the Communications Act-Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Services Licenses* ("Broadcast First Report and Order"), First Report and Order, 13 FCC Rcd 15920 (1998); *recon denied*, Memorandum Opinion and Order, 14 FCC Rcd 8724 (1999); *modified*, Memorandum Opinion and Order, 14 FCC Rcd 12541 (1999).

⁹ *Broadcast First Report and Order* at 15964-65.

¹⁰ See *Revision of FM Assignment Policies and Procedures*, Second Report and Order, 90 FCC 2d 88 (1982). The FM allotment priorities are as follows: (1) First fulltime aural service, (2) Second fulltime aural service, (3) First local transmission service, and (4) Other public interest matters. Co-equal weight is given to Priorities (2) and (3). The FM allotment priorities were first applied to Section 307(b) determinations in mutually exclusive AM proceedings in *Alessandro Broadcasting Co.*, Decision, 56 RR 2d 1568 (Rev. Bd. 1984).

generally favored the provision of service to the greatest number of people.¹¹ The applicants provided the following information regarding the number of persons served by their proposals: Ostlund states that his Easton proposal will serve 807,175 persons within its 0.5 mV/m contour, and 615,088 persons within its 2 mV/m contour, and provide nighttime interference-free service to 586,605 persons. Huron states that its Huron proposal will serve 1,132,335 persons within its 0.5 mV/m contour, 93,487 persons within its 2 mV/m contour, and provide nighttime interference-free service to 5,852 persons. Favorita states that its Auberry proposal will serve 713,229 persons within its 0.5 mV/m contour, and 19,115 persons within its 2 mV/m contour, and provide nighttime interference-free service to 3,441 persons. Hilo states that its Captain Cook proposal will serve 50,735 persons within its 0.5 mV/m contour, 35,428 persons within its 2 mV/m contour, and provide nighttime interference-free service to 18,457 persons.

Independent population counts by the Commission staff reveal that: Ostlund's proposal would serve 688,172 persons in its daytime 0.5 mV/m contour; 614,011 persons in its daytime 2 mV/m contour; and 665,742 persons in its 6.6 mV/m nighttime interference-free contour;¹² Huron's proposal would serve 267,563 persons in its daytime 0.5 mV/m contour; 103,955 persons in its daytime 2 mV/m contour; and 11,347 persons in its 7.2 mV/m nighttime interference-free contour; Favorita's proposal would serve 161,707 persons in its daytime 0.5 mV/m contour; 21,145 persons in its daytime 2 mV/m contour; and 5,811 persons in its 7.3 mV/m nighttime interference-free contour; and Hilo's Captain Cook proposal would serve 89,568 persons in its daytime 0.5 mV/m contour; and 33,636 persons in both its daytime 2 mV/m and nighttime interference-free contours.

It is clear that Ostlund's Easton proposal would serve significantly more people than any of the other proposals. Given the significant reception service differential between the Ostlund proposal and the other three proposals, we find that Ostlund's Easton proposal merits a dispositive Section 307(b)

¹¹ See *Nelson Enterprises, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 13350 (2004) (finding no error in the use of population coverage to award a Section 307(b) preference under priority (4) and endorsing continued use of population coverage differentials in evaluating Section 307(b) analyses in AM auction applications). See also *Greenup, Kentucky and Athens, Ohio*, Memorandum Opinion and Order, 6 FCC Rcd 1493, 1497 (1991) ("[U]nder priority four, other public interest matters, we will first consider simple net differences in the number of persons newly served by each proposal").

¹² By definition in 47 C.F.R. § 73.182(d), the AM groundwave signal strength necessary to provide primary service to communities with populations of 2,500 or more persons is 2 mV/m, and the AM groundwave signal strength necessary to provide primary service to communities with populations less than 2,500 persons is defined as 0.5 mV/m. Thus, when counting the population within an AM daytime 2 mV/m field strength contour, all communities, regardless of size, are included, but when counting the population within an AM daytime 0.5 mV/m field strength contour, communities with populations of 2,500 or more persons that are located inside the 0.5 mV/m contour but outside the 2 mV/m contour must be excluded from the population count. The practical effect of the rule is that an applicant is not recognized as serving the community if it fails to render the specified signal strength intensity to the community. See *Amendment of the AM Broadcast Station Rules with Respect to Signal Coverage Requirements over Community Business and Factory Areas*, Report and Order, 49 FR 23345 (1984) (Section 73.182(f) specifies the signal levels necessary to render primary service to different types of service areas. Amended rule so that primary service signal strength requirement based only on a population standard); *Tucson Radio, Inc. (KEVT)*, Memorandum Opinion and Order, 35 F.C.C.2d 584 (1972) (in order to determine the population which a proposed station will be credited with serving, 47 C.F.R. § 73.182(g) (1972) specified signal strength requirements of 0.5 mV/m for towns with populations under 2,500; 2.0 mV/m for communities with populations between 2,500 and 10,000; and signal strengths of varying higher intensity for city business districts (emphasis added)).

preference, under Priority (4) of the allotment priorities, and Ostlund will be directed to continue the application process by filing a complete FCC Form 301 application.¹³

Petitions for Reconsideration. Ostlund seeks reconsideration of the Staff Decision based on his disagreement with our finding that Easton is not independent of the Fresno Urbanized Area. We do not revisit that determination based upon our finding here that Ostlund's proposal warrants a dispositive Section 307(b) preference under Priority (4). Given this outcome, we dismiss Ostlund's Petition for Reconsideration as moot.

Hilo also seeks reconsideration, arguing that because its Captain Cook proposal was not mutually exclusive with the formerly prevailing Citicasters application, both proposals should have been invited to file Form 301 applications.¹⁴ Hilo also briefly revisits our denial of its Motion to Sever, seeking waiver of Section 73.182(k)(2) of the Commission's Rules (the "Rules").¹⁵ We find that Hilo's primary argument is mooted by our Section 307(b) determination in Ostlund's favor – since Ostlund's and Hilo's proposals are mutually exclusive, by definition both cannot be granted. Moreover, Hilo provides no new evidence or argument regarding our denial of its request for waiver of the prohibition against nighttime interference.¹⁶ It thus fails to state a reason for us to overturn our denial of its Motion to Sever,¹⁷ and we decline to do so. We therefore deny Hilo's Petition for Reconsideration.

Conclusion. Accordingly, IT IS ORDERED that the Petition for Reconsideration filed by John Edward Ostlund IS DISMISSED AS MOOT, and that the Petition for Reconsideration filed by Hilo Broadcasting, LLC, IS DENIED. IT IS FURTHER ORDERED that Ostlund, within 60 days of the date of this letter, is to file a complete FCC Form 301 in connection with its application for a new AM broadcast station at Easton, California (File No. BNP-20040129AMT), pursuant to the procedures set forth in the Commission's Rules.¹⁸ With his application, Ostlund must simultaneously submit the required filing fee for a new commercial AM radio station and an FCC Form 159, Remittance Advice.

The facilities proposed in the FCC Form 301 must comply with all applicable AM rules. Ostlund must demonstrate that the proposed facility protects existing stations and earlier filed applications, and

¹³ After the FCC Form 301 is filed, the staff will conduct a complete legal and technical analysis. We will issue Public Notices entitled "Broadcast Applications," announcing AM auction applications determined to be acceptable for filing. These notices will be generated by the Consolidated Database System ("CDBS"). Petitions to deny an FCC Form 301 application, must be filed within 10 days following release of the Broadcast Applications Public Notice announcing acceptance of the application at issue. *Broadcast First Report and Order*, 13 FCC Rcd at 15985. The staff will dismiss the applications filed by Hilo (File No. BNP-20040127ABN); Favorita (File No. BNP-20040128ANN); and Huron (File No. BNP-20040130BOC) upon action taken on the application filed by Ostlund.

¹⁴ Hilo Petition for Reconsideration at 5-9.

¹⁵ 47 C.F.R. § 73.182(k)(2).

¹⁶ *Id.* See Hilo Petition for Reconsideration at 9-10.

¹⁷ See *S&L Teen Hospital Shuttle*, Order on Reconsideration, 17 FCC Rcd 7899, 7900 (2002) ("It is settled Commission policy that petitions for reconsideration are not to be used for the mere reargument of points previously advanced and rejected.").

¹⁸ See 47 C.F.R. §§ 0.401(b), 1.1104, 1.1109, 73.5005(d), and 73.3512.

that the daytime and nighttime facilities comply with principal city coverage requirements.¹⁹ Any differences between the tech box proposal filed during the AM Auction No. 84 filing window and the complete FCC Form 301 must be minor changes, as defined by the applicable AM service rules,²⁰ and must not create new application conflicts. In addition, the technical facilities proposed in the FCC Form 301 application must maintain (or improve) the level of service, in terms of population, on which the dispositive Section 307(b) preference was based.

The complete FCC Form 301 application must be filed electronically through the Media Bureau's Consolidated Database System (CDBS) online electronic forms system. For information regarding electronic application filing, refer to the April 28, 2000, Public Notice, *Mass Media Bureau Implements Consolidated Database System (CDBS) Electronic Filing of FCC Forms 301, 302, 314, 315, 316, and 347*. When filing the complete FCC Form 301, an applicant must select "Long Form Application for AM Auction No. 84" on the Pre-form for Form 301 (Question 2 – Application Purpose). In addition, the CDBS file number previously issued to the tech box submission filed in the AM Auction No. 84 filing window must be entered on the Pre-form in the field "Eng. Proposal File Number." Instructions for use of the electronic filing system are available in the CDBS User's Guide, which can be accessed from the electronic filing website at <http://www.fcc.gov/mb/elecfile.html>. For assistance with electronic filing, call the Audio Division Help Desk at (202) 418-2662.

The staff will return applications not submitted in accordance with the procedures described above. Failure to timely file the complete FCC Form 301 application, **on or before November 3, 2008**, will result in dismissal of the tech box proposal filed during the AM Auction No. 84 filing window for failure to prosecute, pursuant to Section 73.3568 of the Commission's Rules.²¹

Sincerely,



Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Citicasters Licenses, L.P.
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¹⁹ See *id.* §§ 73.24, 73.37, and 73.182.

²⁰ *Id.* § 73.3571.

²¹ *Id.* § 73.3568.